

UNITED STATES DISTRICT COURT

District of Colorado

UNITED STATES OF AMERICA

v.

ISMAIL ALKAN DUZYURT
a/k/a Al Paolo Duzyurt Lucci

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:17-cr-00251-MSK-01

USM Number: 14322-179

Timothy Patrick O'Hara, AFPD
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count 1 of the Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
8 U.S.C. § 1326(a) and (b)(2)	Illegal Re-entry After Deportation Subsequent to an Aggravated Felony Offense	11/23/16	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment in accordance with the findings and conclusions made in open court, a transcript of which is attached hereto and incorporated in by this reference. The sentence is imposed pursuant the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 11, 2018

Date of Imposition of Judgment

Marcia S. Krieger

Signature of Judge

Marcia S. Krieger, Chief United States District Judge

Name and Title of Judge

January 29, 2018

Date

DEFENDANT: ISMAIL ALKAN DUZYURT
CASE NUMBER: 1:17-cr-00251-MSK-01

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: Twenty (20) months, to run consecutively to the sentence imposed in Eagle County District Court, Case No. 2016CR308.

- ☐ The court makes the following recommendations to the Bureau of Prisons:
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _____ ☐ a.m. ☐ p.m. on _____ .
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on _____ .
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ISMAIL ALKAN DUZYURT
CASE NUMBER: 1:17-cr-00251-MSK-01

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: three (3) years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☒ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: ISMAIL ALKAN DUZYURT
CASE NUMBER: 1:17-cr-00251-MSK-01

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: ISMAIL ALKAN DUZYURT
CASE NUMBER: 1:17-cr-00251-MSK-01

SPECIAL CONDITIONS OF SUPERVISION

1. If you are deported, you must not thereafter re-enter the United States illegally. If you re-enter the United States legally, you must report to the nearest U.S. Probation Office within 72 hours of your return.

DEFENDANT: ISMAIL ALKAN DUZYURT
CASE NUMBER: 1:17-cr-00251-MSK-01

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the following page.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$ 0.00	\$ 0.00	\$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS	\$ _____	\$ _____
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ISMAIL ALKAN DUZYURT
CASE NUMBER: 1:17-cr-00251-MSK-01

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☐ Lump sum payment of \$ _____ due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT A assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 17-cr-00251

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ISMAIL ALKAN DUZYURT,

Defendant.

REPORTER'S TRANSCRIPT

(Sentencing Hearing: Order)

Proceedings before the HONORABLE MARCIA S. KRIEGER,
Judge, United States District Court for the District of
Colorado, commencing at 1:22 p.m., on the 11th day of January,
2018, United States Courthouse, Grand Junction, Colorado.

A P P E A R A N C E S

PETER HAUTZINGER, Assistant U.S. Attorney, 205 North
4th Street, Suite 400, Grand Junction, Colorado, 81501,
appearing for the Government.

TIMOTHY O'HARA, Assistant Federal Public Defender, 633
17th Street, 10th Floor, Denver, Colorado, 80202, appearing for
the Defendant.

THERESE LINDBLOM, Official Reporter
901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

1 (The following proceedings were had and entered of
2 record after the Court heard the arguments of counsel and
3 statement of defendant:)

4 *THE COURT:* Okay.

5 Thank you.

6 I'll announce the sentence I intend to impose, and, of
7 course, counsel, you'll have the final opportunity to make
8 legal objections before judgment is entered.

9 If you believe that the sentence is premised upon
10 error or it raises an issue that you haven't had the
11 opportunity to research or address, I invite you to request a
12 continuance.

13 Imposition of a sentence in a federal criminal case is
14 governed by a number of statutes. The umbrella statute is
15 18 U.S.C. Section 3553. And in imposing sentence in this case,
16 as in all other cases, the Court is required to consider the
17 objectives and the factors set forth in the statute. The
18 statute requires that the sentence imposed be sufficient but
19 not greater than necessary to satisfy a number of objectives:
20 The sentence must reflect the seriousness of the offense;
21 promote respect for the law; provide just punishment;
22 adequately deter criminal conduct; protect the public from
23 further crimes by the defendant; and provide the defendant with
24 needed educational or vocational training, medical care, or
25 other correctional treatment in the most effective manner.

1 To fashion a sentence that meets these objectives, the
2 statute directs the Court to consider the nature and
3 circumstances of the offense; the history and characteristics
4 of the defendant; the kinds of sentences that are available;
5 the sentence prescribed by the federal sentencing guidelines;
6 the need to avoid unwarranted sentence disparities among
7 defendants with similar records found guilty of similar
8 conduct.

9 At the beginning of the hearing last week, I noted the
10 documents that I had studied in preparation for this hearing; I
11 confirmed that counsel and the defendant had had adequate
12 opportunity to review and consider those documents; I asked
13 whether there was any additional ones that should be
14 considered.

15 There was only one dispute raised as to the factual
16 contents of the presentence report, and that dispute was raised
17 with regard to paragraph 42 of report, an objection to the
18 contents of that paragraph that suggested that the defendant
19 was not involved in his son's life.

20 With regard to that, I note the objection. I assume
21 that the defendant was involved in the -- his son's life, even
22 though his ex-wife has a different perspective. I was told
23 that that was a motivating factor for his return to the United
24 States; but, subsequently, that was not the basis of any
25 argument that was made.

1 I next asked whether there were any disputes as to the
2 calculation of the sentencing range recommended by the federal
3 sentencing guidelines as set out in the presentence report.
4 And the -- both the Government and the defense were somewhat
5 surprised as to how the guidelines were calculated, both in the
6 first report at Docket No. 27 and also subsequently in the
7 revised report at 34.

8 Now, before I deal with those calculations, I want to
9 address a notation that was made in the record at the last
10 hearing.

11 The form plea agreement that is used in this district
12 includes a statement of facts to which the parties stipulate.
13 And at the Rule 11 hearing, the defendant is advised that the
14 Court will treat those facts as true.

15 Under federal law, when the presentence report is
16 prepared, probation officers are authorized to investigate the
17 offense conduct and include those facts in the presentence
18 report as a matter of course. I issue an order in every case
19 that prevents that. I do that because I believe, as I say in
20 the order, it is inappropriate to conduct an independent
21 investigation into the offense behavior, because it would be
22 inconsistent with the parties' plea agreement and could
23 adversely affect the rights of the parties.

24 That language I drew from the practices of Judge
25 Matsch. And I'm the only judge, I believe, who still does

1 this. But I do it because I believe the adversary process
2 involving both the government and the defendant results in
3 stipulated facts in a plea agreement which are sufficient to
4 establish the elements of the crime charged. But this is not
5 intended to be a tool for cutting information out or depriving
6 the Court of the pertinent information. And this case
7 demonstrates why that cannot happen.

8 Because the parties did not like the calculation under
9 the first presentence report, they submitted a supplement to
10 the plea agreement that contained other facts. Not facts
11 pertinent to the offense conduct, but facts that were
12 purportedly helpful to the defendant in reducing the
13 calculation under the federal sentencing guidelines. That was
14 inappropriate.

15 Now, I'll treat those facts as true for purposes of
16 sentencing now upon the belief that defense counsel advised his
17 client that the Court would do exactly that. But it's
18 important that the facts that we rely on in the plea agreement
19 be those that are discussed at the Rule 11 hearing so that the
20 defendant is appropriately advised and that neither party tries
21 to skew the sentencing result by a careful calculation of what
22 facts are disclosed and what facts are not.

23 So that takes us, then, to the current presentence
24 report. That's found at Docket No. 34.

25 The report prepared by the probation office starts out

1 with a calculation of the Base Offense Level for violation of
2 8 U.S.C. Section 1326(a). There is no disagreement that the
3 Base Offense Level here is 8. Then the -- and that is a Base
4 Offense Level of 8, both under the 2015 and the 2016
5 guidelines.

6 From that point on, the difference between the 2015
7 and the 2016 guidelines changes. And it changes because of a
8 change in the guidelines themselves that became effective on
9 November 1, 2016.

10 The defense argues that the parties have stipulated
11 that the 2015 guidelines apply and the Court should apply the
12 2015 guidelines.

13 Let me start by saying, agreements between the parties
14 in the plea agreement as to what guidelines apply are not
15 binding on the Court. Why? Because it is a legal question,
16 one that's not subject to negotiation. And so we turn to
17 the -- the question of whether or not it is the 2015 or the
18 2016 guidelines that apply.

19 Guideline 1B1.11(a) provides that the general rule is
20 that the Court shall use the guidelines manual in effect on the
21 date the defendant is sentenced. That's where we start. That
22 would be the 2016 guidelines. But there is an exception to
23 this general rule, and that's found at 1B1.11(b), which states,
24 "If the Court determines that the use of the guidelines manual
25 in effect on the date that the defendant is sentenced would

1 violate the *ex post facto* clause of the Constitution, the Court
2 should, instead, make all guideline calculations according to
3 the manual in effect on the date that the offense of conviction
4 was committed."

5 If I assume, without necessarily finding, that a
6 November 2016 change in the guidelines would be one that could
7 activate an *ex post facto* concern, the guidelines would direct
8 that I apply the guideline manual in effect on the date that
9 the offense of conviction was committed.

10 So when was the offense committed?

11 The Tenth Circuit has held that the offense of illegal
12 reentry is a continuing offense that is committed continuously
13 until the defendant is found by federal authorities. That
14 holding is found in *U.S. v. Villarreal-Ortiz*, at 553 F.3d 1326,
15 a Tenth Circuit 2009 decision.

16 The defendant's own briefing concedes he was not found
17 until November 23, 2016, by which time the 2016 guidelines
18 manual had taken effect. Thus, even if the guideline 1B1.11(b)
19 applies, it, nevertheless, is appropriate to apply the 2016
20 guidelines manual, as that was the manual in effect at the time
21 the defendant committed the instant offense.

22 So that is the set of guidelines that we are using. I
23 take note of the fact that both counsel believe that the change
24 in the calculation of the ultimate penalty is something that
25 can be considered when I'm looking at sentencing objectives and

1 sentencing factors under 18 U.S.C. Section 3553.

2 Turning back, then, to the calculation in the
3 presentence report. The report finds that there are two
4 specific offense characteristics. The first was -- is pursuant
5 to Section 2L1.2(b)(2)(B), that the defendant was ordered
6 deported or removed from the United States -- I'm sorry, before
7 the defendant was ordered deported or removed from the United
8 States for the first time, the defendant sustained a conviction
9 for a felony offense other than illegal reentry, for which the
10 sentence imposed was two years or more.

11 The report reads that the defendant was convicted of
12 money laundering and false statement to acquire a firearm and
13 received a time-served sentence after serving 31 months in
14 custody in the United States District Court, Southern District
15 of Texas, Case No. 02-cr-578-007. And as a consequence, eight
16 levels are added.

17 The defense argues that this particular conviction
18 should not be counted. It shouldn't be counted for at least
19 two reasons. First, it's old. Yes, it's old; but that doesn't
20 mean we don't count it.

21 The second reason is because we don't know how long
22 the sentence was. And the general rule for reaching back on
23 prior sentences is that there is a ten-year time range if we're
24 considering sentences of a year and a month, but it's a 15-year
25 time range for a sentence of, here, 31 months in custody, time

1 served.

2 So the second argument that is made by the defense, as
3 I understand it, is that this really isn't a time -- this
4 sentence -- sentence -- I'm sorry. This sentence is not a
5 prior sentence for purposes of Section 4A1.1.

6 My research on this issue, which is the only case law
7 that is offered here, comes from the Fourth Circuit and the
8 Tenth Circuit.

9 In the Fourth Circuit, *United States v. Jacobs*, at 400
10 Fed.Appx. 712, a 2010 case, addressed an issue with regard to
11 crediting a defendant for time served, and found that crediting
12 a defendant for time served does not equate to imposing a
13 sentence of probation.

14 Now, if it were a sentence of probation, it would fall
15 outside of 4A1.1, but it's not a sentence of probation.

16 *U.S. v. Melendez*, at 88 Fed.Appx. 529, a Third Circuit
17 decision in 2004, states that the term of imprisonment actually
18 imposed on a prior conviction was 448 days, and it was treated
19 as the term intended by the sentencing court.

20 Now, at that juncture, the defense argues that the
21 Court should not refer to any extrinsic evidence as to what the
22 length of the sentence was. For that proposition, I don't know
23 what authority defense counsel is relying on, because none was
24 offered. But it is clear that there was no objection to the
25 factual statements in the presentence report -- not extrinsic

1 evidence -- that the defendant was detained in the Texas case
2 for in excess of 975 days, or approximately 32 months. It is
3 also undisputed that at the time sentence was imposed for the
4 conviction on the counts in that case, that it was a
5 time-served sentence.

6 And pursuant, then, to *United States v.*
7 *Rodriguez-Lopez*, at 170 F.3d 1244, a Ninth Circuit 1999 case, a
8 defendant's prior sentence to time served is properly placed
9 into the sentencing calculation, because it was the actual time
10 that was served.

11 Melendez was a prisoner for 448 days when he was
12 sentenced to time served, and that was treated as a sentence of
13 that amount of time.

14 So treating the sentence imposed in 2005 for crimes
15 committed in 2002 as a sentence of in excess of 32 months, the
16 objection to the calculation in the presentence report to the
17 specific offense characteristic under Section 2L1.2(b)(2)(B) is
18 overruled. There are an additional eight levels under the 2016
19 guidelines that are added for the conviction of money
20 laundering and false statement to acquire a firearm.

21 There are another eight levels that are added as a
22 specific offense characteristic because the defendant was
23 ordered deported and removed from the United States, and after
24 that determination, he engaged in criminal conduct resulting in
25 the conviction of a felony offense. Under Section

1 2L1.2(b)(3)(B), that results in an additional eight levels for
2 a specific offense characteristic.

3 There is no dispute that after he -- after the
4 defendant was deported or removed -- and he was removed, by his
5 own admission, in 2005 and 2012 -- he was convicted here in
6 Eagle County of ID theft, altering and making a written
7 instrument, forgery, a check commercial instrument, and theft,
8 and was sentenced on November 23, 2016, to 3.5 years of prison
9 in Eagle County District Court, Case No. 2016-cr-308. That
10 results in an additional eight levels.

11 So there is an Adjusted Offense Level of 24.

12 The defendant gets the maximum reduction for
13 acceptance of responsibility of three levels reduction, and
14 that results in an offense level of 21.

15 Then there is an additional reduction because the
16 Government has asked for a fast-track reduction of three
17 levels, which further reduces the offense level to 18.

18 We turn, then, to the criminal history. The criminal
19 history calculations result in nine criminal history points,
20 and they put the defendant in Criminal History Category IV.
21 But that's really not the whole story here. It's helpful to
22 see this criminal history in the longitudinal perspective,
23 based upon other information that is not challenged in the
24 presentence report.

25 The defendant came to the United States when he was

1 first 17. He lived with his uncle, and he played soccer and
2 went to school. He came back on an F-1 visa to attend college,
3 but he had insufficient language skills, and so he left the
4 United States. Then there is a gap.

5 In 2001, he got a work permit, but he was arrested in
6 2002 and placed in federal custody in the 2002 case in Texas.
7 After that was resolved with a time-served sentence, according
8 to his statement to me today, he was placed on supervised
9 release. But he had no papers that allowed him to be here
10 lawfully in the United States, and so in 2005, he was removed.

11 He reentered the United States in 2009 at the
12 invitation of the federal government and stayed here for a
13 period of time on a permissive work visa. Then he was deported
14 in 2012. This is an overlay to the criminal history.

15 In 2002 he was charged with money laundering, false
16 statement to acquire a firearm -- and it's important to note,
17 that false statement was a representation that he was a U.S.
18 citizen when he was not. That resulted in the convictions and
19 the time-served sentence. He was then convicted in 2005 in
20 Texas state court of felony theft involving eight motor
21 vehicles. In 2016, after he came back to the United States of
22 America, having been deported in 2012, he's charged with the
23 counts for which he was convicted in Eagle County. Again,
24 theft, altering or making a written instrument, forgery. That
25 resulted in a sentence of 3.5 years.

1 With a Criminal History Category of IV and a criminal
2 history -- and an offense level of 18, the guidelines recommend
3 incarceration of 41 to 51 months. I'm sorry, not sure what the
4 fine amount is, because the amount I have here is not correct.

5 So let me ask our probation officer, what's the fine
6 amount?

7 *PROBATION OFFICER:* Your Honor, it would be 10,000 to
8 100,000.

9 *THE COURT:* For a level 18, criminal history IV?

10 *PROBATION OFFICER:* Let me just check that again, Your
11 Honor.

12 Yes, Your Honor, it would be 10,000 to 100,000.

13 *THE COURT:* Thank you.

14 Now, there are a number of arguments that are made
15 with regard to the criminal history category. First of all,
16 the defense argues that the Court should depart under the
17 provisions of 2L1.2. And in the 2016 guidelines, that is at
18 note 6. This departure is requested because the defendant is
19 in state custody, he's here on a writ, and the defense argues
20 that there should be some departure in light of the fact that
21 the prosecution of the state case occurred before the
22 prosecution of the federal cause and, therefore, the state case
23 became criminal history for purposes of sentencing here.

24 What the note says is that "In a case where the
25 defendant is located by immigration authorities while the

1 defendant is serving time in state custody, whether for pre- or
2 post-conviction, for a state offense, the time served is not
3 covered by an adjustment for 5G1.3(b) and, accordingly, is not
4 covered by a departure under Section 5K2.23, discharged terms
5 of imprisonment.

6 "In such a case" -- and that's this case -- "the Court
7 may consider whether a departure is appropriate to reflect all
8 or part of the time served in state custody from the time
9 immigration authorities locate the defendant until the service
10 of the federal sentence commences, that the Court determines
11 will not be credited to the federal sentence by the Bureau of
12 Prisons. Any such departure should be fashioned to achieve a
13 reasonable punishment for the instant offense."

14 The comment goes on to say that "Such a departure
15 should be considered only in cases where the departure is not
16 likely to increase the risk to the public from further crimes
17 of the defendant."

18 I have doubts about that. If I assume that the
19 defendant will be deported and he will stay outside the United
20 States, then we don't have a risk to the public from further
21 crimes by the defendant. But if I assume that he stays in the
22 United States, his track record here is not good. He has tax
23 liens, which means he hasn't paid taxes. He's been repeatedly
24 convicted of fraud, of theft, of forgery. He's misrepresented
25 his status in the United States. And the danger of these kinds

1 of crimes being committed in the future I think is substantial.

2 I see no legitimate activity that he can engage in to
3 support himself here in the United States, and it is of great
4 concern to me that he will commit crimes in the future. I
5 also, taking into account his history, think that each time he
6 has been approached with regard to a request for cooperation
7 with the authorities, he's taken advantage of that. That's a
8 help to the authorities in that case; but it suggests that he
9 has something that he knows or can share that would be useful
10 to the authorities, which suggests involvement in criminal
11 activity which is not reflected in his criminal history.

12 But I'll assume here this is the right kind of case to
13 think about this departure. So if I think about this
14 departure, the guideline tells me to consider, among other
15 things, whether the defendant engaged in additional criminal
16 activity after illegally reentering the United States. Yes, he
17 did, and very much the same kind of criminal activity he had
18 engaged in many years before, the last time he was here.

19 The seriousness of the additional criminal activity,
20 including whether he used violence and credible threats of
21 violence, and the like.

22 Now, the important word here is "including." There
23 isn't any -- any use of violence or credible threats of
24 violence, or -- that were used in the Eagle County crime, but I
25 note that he had possession of a firearm in his 2002 conduct

1 that he obtained illegally. And I note that the behavior is
2 strikingly similar. Theft, forgery, misrepresentations,
3 fictitious instruments. The crimes are very much the same in
4 2002 and 2016.

5 I'm also to consider whether the criminal activity
6 resulted in death or serious bodily injury; it did not. And
7 I'm to consider whether the defendant was an organizer, leader,
8 manager, or supervisor of others in criminal activity. I have
9 no evidence with regard to that. And I'm to consider the
10 seriousness of the defendant's other criminal history. It's
11 serious, and it's repetitive.

12 I therefore decline to impose a departure based upon
13 the fact that the defendant has time that he's served in state
14 custody that may or may not be considered by the Bureau of
15 Prisons.

16 In addition to the reasons I just gave for that, I
17 note that this is one of those situations where the defendant
18 was found in the custody of the state on state charges. And
19 there is no indication that the government has skewed or
20 manipulated the prosecution or the ordering of the prosecution
21 between the state prosecution and the federal government
22 prosecution. Were that the case, I might conclude differently;
23 but there is nothing to suggest that that's the case here.

24 The next request for departure is under Section 4A1.3.
25 That is the section that applies when there is a criminal

1 history category that substantially over or underrepresents the
2 seriousness of the defendant's criminal history or the
3 likelihood that the defendant will commit other crimes.

4 As I've noted, my view of this criminal history is
5 it's consistent, the crimes are similar, they're over a long
6 period of time, they most often involve deceit. And I think
7 the Criminal History Category of IV, although it is slightly on
8 the high side, does not substantially overrepresent the
9 seriousness of the defendant's criminal history. I therefore
10 conclude that the calculation under the guidelines results in a
11 guideline range consonant with an offense level of 18 and a
12 Criminal History Category of IV.

13 Now, the question comes whether there should be a
14 variant sentence, whether the sentencing range of 41 to 51
15 months constitutes a sentence that meets the requirements of
16 18 U.S.C. Section 3553. I find it does not. It exceeds what
17 is necessary under 18 U.S.C. Section 3553. And, therefore, I
18 intend to impose a variant sentence. It is not the sentence
19 that the defense has requested. It is a sentence that reflects
20 several things.

21 First of all, a significant change in the guidelines
22 and their calculations over 2016 and 2015. This does not
23 result from sympathy for the defendant. When you're breaking
24 the law, you can't choose when you're going to get caught. And
25 whatever the law is when you get caught is what you're going to

1 be held accountable for. So you can't complain that the law
2 enforcement personnel should have caught you earlier so that
3 you could have gotten a lighter sentence. But there is a
4 substantial difference between the calculations under the 2016
5 and 2015 guidelines that feature prominently when I look at a
6 sentence that is necessary and sufficient to meet the
7 sentencing objectives.

8 In looking at the conduct here, this is not the
9 situation where a man comes to the United States, is deported,
10 returns again, is deported, returns again, is deported. This
11 is more nuanced, but there is no doubt in my mind that the
12 defendant here knew he was not supposed to be here. He had
13 played with a wide variety of visas and attempted to change his
14 immigration status through a marriage and had cooperated with
15 law enforcement to be here. So to say that he is
16 unsophisticated about the need to have permission to be in this
17 country would not be a correct statement.

18 I also take into account the fact that his
19 characteristics as reflected in the presentence report reflect
20 deceit at every turn, in his personal relationships, in his
21 business relationships, with regard to both of the large series
22 of felony convictions in 2002 and 2016. And it appears that no
23 sentence, including the 32 months he spent in Texas, have
24 convinced him of the need to maintain honest dealings and
25 adherence to the law.

1 I also take into account the fact that there is no
2 overlap between his illegal reentry as a federal offense and
3 his state convictions in Eagle County that justify a
4 consecutive sentence. And, indeed, to impose -- I'm sorry, a
5 concurrent sentence. And, indeed, to impose a concurrent
6 sentence would send the wrong message. There are two wrongs
7 here, two things that were illegal, and they each require
8 separate sentences that should run consecutively.

9 I'm not persuaded that the concern that the state
10 sentence is somewhat indeterminate should make this sentence
11 concurrent. I think Mr. Duzyurt deserves a sentence for each
12 of the acts that he has committed that broke the law.

13 So taking into account all of these factors, I'm
14 inclined to turn the clock back a little bit to measure what it
15 is that we might have otherwise had as a sentence had the times
16 been slightly different. And I agree with the Government's
17 analysis that if there were not the enhancements that were
18 added because of both the past conviction and the -- in 2002
19 and the past conviction in 2016, we would be looking at an
20 offense level of 10 with a Criminal History Category of IV.
21 And that would have resulted in a guideline range of 15 to 20
22 months. That, to me, is appropriate, that range.

23 And in that range, Mr. Duzyurt's characteristics and
24 behavior, and, frankly, absence of remorse argues for a
25 sentence at the top end of that range, 20 months of

1 incarceration, to run consecutively to his state court
2 conviction in Eagle County.

3 So just to sum up, I intend to impose a special
4 assessment of \$100, because there is one offense and the
5 statute requires it. I do not intend to impose a fine because
6 he lacks the ability to pay one. I intend to impose three
7 years of supervised release, with a singular special condition.
8 And that is, if he is deported, he not return to the United
9 States illegally. And if he can return legally, he report to
10 the nearest United States Probation Office within 72 hours of
11 his return.

12 And let me be absolutely clear about why I'm doing
13 that. It's as a deterrent. I know that Mr. Duzyurt wants to
14 live in the United States, but want is not enough. Compliance
15 with the law is required. And this is to remind you that if
16 you come back illegally or you don't report when you're
17 supposed to, you can be punished for that, itself. And that
18 means that if you come back illegally, you can be charged and
19 convicted for illegally reentering and, similarly, charged and
20 convicted with a violation of supervised release. And two
21 sentences can be imposed, and they can run consecutively. It's
22 a deterrence.

23 And I intend to impose a custodial term of 20 months
24 to run consecutively with the state court sentence.

25 Any need for clarification or further explanation?

1 MR. HAUTZINGER: Not for the Government.

2 MR. O'HARA: Your Honor, briefly.

3 The Court said that -- I think I heard the Court
4 correctly, that if it were calculating this under the -- well,
5 the last statement the Court made about the alternative,
6 agreeing with the Government. If I could clarify as to what
7 the Court said about that.

8 THE COURT: Just took into account the fact that there
9 might -- there would have been a different result under the
10 2015 guidelines. I did not calculate what they were and did
11 not intend to.

12 MR. O'HARA: Okay.

13 Your Honor, may I just speak to Mr. Duzyurt?

14 THE COURT: Sure.

15 (Off-the-record discussion between counsel and
16 defendant.)

17 MR. O'HARA: Your Honor, is this the opportunity that
18 the Court is giving me in order to make any objections to the
19 Court's ruling?

20 THE COURT: Yes.

21 MR. O'HARA: Okay.

22 Then, Your Honor, I would object to the Court's use of
23 the 2016 guidelines for the reasons I've previously stated. I
24 would object to the timing of the government's presentation of
25 its -- the days in custody, as that information was not

1 presented at the previous hearing. I would object to the
2 Court's denial of the departures in this case for time
3 considered in state custody.

4 In support of its denial of that, the Court mentioned
5 a tax lien. And, Your Honor, the way that the PSI is written
6 is that it is unknown if this lien remains unsatisfied --
7 reading from Paragraph 58 of Document 34. My client has
8 informed me that it's his belief that that lien has been
9 satisfied.

10 *THE COURT:* Doesn't matter. It was imposed.

11 *MR. O'HARA:* The -- it's my understanding, Your Honor,
12 that if the 2015 guidelines were used and -- well, that the
13 guideline range would likely be lower than that calculated by
14 the Court, more consistent with those guideline calculations
15 that we included in the plea agreement, two to eight or four to
16 ten months. And I would object to the Court's -- the
17 consecutive nature of the Court's sentence.

18 If I may just have one moment to speak to my client,
19 Your Honor.

20 *THE COURT:* You may.

21 *MR. O'HARA:* Thank you.

22 (Off-the-record discussion between counsel and
23 defendant.)

24 *MR. O'HARA:* Thank you, Your Honor. That's all I
25 have.

1 THE COURT: Thank you.

2 Mr. Duzyurt, please join your counsel at the lectern.

3 Having announced the sentence that I believe comports
4 with the sentencing objectives of 18 U.S.C. Section 3553, and
5 pursuant to the Sentencing Reform Act of 1984, it is the
6 judgment of the Court that the defendant, Ismail Alkan Duzyurt,
7 be committed to the custody of the Bureau of Prisons to be
8 imprisoned for a period of 20 months. His sentence will run
9 consecutively to the pending -- sentence that has been imposed
10 in the Colorado Eagle County case.

11 Upon release from imprisonment, he will be placed on
12 supervised release for a term of three years. If he is not
13 deported, he'll -- within 72 hours of release from the custody
14 of the Bureau of Prisons, he'll report in person to the
15 probation office in the district to which he is released.

16 While on supervision, he will not commit another
17 federal, state, or local crime and will not unlawfully possess
18 a controlled substance or a prohibited firearm.

19 I waive the mandatory drug testing provisions of
20 18 U.S.C. Section 3563 because it is likely that the defendant
21 will be deported. However, he will cooperate in the collection
22 of DNA as directed by the probation officer.

23 And I impose a special condition, but not the standard
24 conditions imposed by General Order 2016-1. The special
25 condition is that if he's deported, he will not thereafter

1 reenter the United States illegally. If he reenters the United
2 States legally, he must report to the nearest United States
3 Probation Office within 72 hours of his return.

4 No fine is imposed for the reasons stated. A special
5 assessment of \$100 is imposed and is due and payable
6 immediately.

7 Mr. Duzyurt, I advise you of your right to appeal this
8 sentence if you reserve that right in your plea agreement. In
9 order to exercise such a right, you must file a notice of
10 appeal within 14 days after entry of judgment or you lose that
11 right to appeal. If you're unable to afford an attorney for an
12 appeal, one could be appointed to represent you. That requires
13 the filing of a timely notice of appeal. Mr. O'Hara usually
14 takes care of that for you. But if for some reason he's unable
15 or unwilling to do so, you may request and I'll direct that the
16 Clerk of Court file a notice of appeal on your behalf.

17 Is there any further business to bring before the
18 Court?

19 MR. HAUTZINGER: Not from the Government, Your Honor.

20 MR. O'HARA: Your Honor, just for clarification. Is
21 the Court considering Document 29, which is the supplemental
22 facts admitted for purposes of this hearing?

23 THE COURT: Yes.

24 MR. O'HARA: Okay. Thank you.

25 Then I have nothing further.

1 THE COURT: Thank you.

2 Then the defendant will be remanded to the custody of
3 the United States Marshal Service. We'll stand in brief
4 recess. I understand we have a verdict in the other case, and
5 so we'll reconvene as soon as we can.

6 (Recess at 3:10 p.m.)
7
8

9 REPORTER'S CERTIFICATE

10 I certify that the foregoing is a correct transcript from
11 the record of proceedings in the above-entitled matter.

12 Dated at Denver, Colorado, this 17th day of January,
13 2018.

14 *Therese Lindblom*

15 _____
Therese Lindblom, CSR, RMR, CRR
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